

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA, a foreign  
insurer,

Plaintiff,

v.

WALSH CONSTRUCTION COMPANY II  
LLC, an Illinois Limited Liability Company;  
and ARCH SPECIAL INSURANCE  
COMPANY, a foreign insurer,

Defendants.

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WALSH CONSTRUCTION COMPANY II,  
LLC, an Illinois Limited Liability Company,

Third Party Plaintiff,

v.

GREENWICH INSURANCE COMPANY,  
a foreign insurer,

Third Party Defendant.

CASE NO. 2:22-CV-00589 RSM-BAT

**ORDER GRANTING WALSH  
CONSTRUCTION COMPANY II,  
LLC’S MOTION FOR LEAVE TO  
AMEND COUNTERCLAIM AND  
THIRD-PARTY COMPLAINT**

Walsh Construction Company II, LLC (“Walsh”) filed a Motion for Leave to Amend Counterclaim against the Travelers Casualty Property of America (“Travelers”) and Third-Party Complaint against Greenwich Ins. Co. (“Greenwich”). Dkt. 90-2. Greenwich does not oppose the

1 proposed amendment. Dkt. 96. Travelers opposes the proposed amendment on the grounds of  
2 futility. Dkt. 94. For the reasons stated herein, the Court grants the motion.

### 3 BACKGROUND

4 On May 2, 2022, Travelers filed this insurance coverage dispute against Walsh and one  
5 of Walsh's other insurers, Arch Specialty Insurance Co. ("Arch"). Walsh filed Counterclaims  
6 against Travelers and a Third-Party Complaint against Greenwich. The parties agreed to stay  
7 motion practice and discovery related to all issues other than the duty to defend. Dkt. 51. On July  
8 11, 2023, the Court struck the existing trial date and entered a stay of "all discovery and motion  
9 practice related to Walsh's extra-contractual claims and any issues related to indemnity coverage  
10 under any policy that is determined to provide Walsh with a duty to defend." Dkt. 52.

11 The parties proceeded with litigating the duty to defend, with each party filing a motion  
12 for summary judgment. While the summary judgment motions were pending, the underlying  
13 lawsuit was voluntarily dismissed, thereby rendering the issue of Travelers' ongoing defense  
14 obligation moot. On February 7, 2024, the Court ruled on the parties' motions, dismissing  
15 Travelers' claims against Arch and holding that Travelers and Greenwich had a duty to defend  
16 Walsh in the underlying lawsuit. Dkt. 75; Dkt. 84. The Court also declared "that Greenwich  
17 had a duty to defend and breached that duty." Dkt. 75 at p. 21; Dkt. 84.

18 The parties filed a Joint Status Report on March 22, 2024 (Dkt. 86), in which Walsh  
19 stated its intent "to move to amend its counterclaims and Third-Party Complaint to conform to  
20 information obtained in discovery, and to clarify the factual and legal basis for its claims against  
21 Travelers and Greenwich." Dkt. 86, p. 3. On March 28, 2024, the Court lifted the stay and set  
22 April 22, 2024, as the deadline to amend the pleadings. Dkt. 87.

1 On April 5, 2024, Walsh sent counsel for Travelers and Greenwich a written request to  
2 consent to the proposed Amendments. Neither Travelers nor Greenwich responded to Walsh's  
3 request.

4 WALSH'S PROPOSED AMENDMENTS

5 Walsh seeks to amend its pleadings to include information acquired during discovery.  
6 From Walsh's review of Travelers' claim file, Walsh discovered Travelers Adjuster Sandy Ngo  
7 acknowledged that because the underlying lawsuit was filed in Washington, Travelers would  
8 likely owe Walsh pre-tender fees and costs. Dkt. 91, Declaration of Alexander E. Ackel ("Ackel  
9 Decl."); Dkt. 92, Ex. A (Excerpt of Travelers Claims Notes for Claim No. ACQ6261). But at no  
10 point in the handling of Walsh's claim did Travelers ask Walsh about any pre-tender fees and  
11 costs or acknowledge that it owed such fees. Walsh incurred over \$75,000 in defense fees and  
12 costs between the date of filing of the Underlying Lawsuit and the date Travelers agreed to offer  
13 a reservation of rights defense to Walsh. Under the Washington Unfair Claims Settlement  
14 Practice regulation WAC 284-30-350(1), it is an unfair and deceptive trade practice for an  
15 insurer to fail to disclose pertinent policy benefits and coverages to its insured. Accordingly,  
16 Walsh seeks to include specific allegations regarding Travelers' failure to act in good faith and in  
17 compliance with this regulation. *See* Dkt. 90-2, ¶¶ 50-53, 73-74, 77.

18 Similarly, in discovery of Greenwich's claim file, Walsh learned Greenwich had made no  
19 effort to respond to Walsh's tender of defense until it belatedly offered a reservation of rights  
20 defense on June 23, 2023 – on the eve of the parties' motions for summary judgment. *See* Dkt.  
21 45-1 at pp. 23-33. The Court declared as a matter of law that Greenwich breached its duty to  
22 defend Walsh. Dkt. 75, p. 21; Dkt. 84. Walsh seeks to amend the factual allegations of its  
23 pleadings to account for the fact that neither Greenwich nor Travelers made any effort to inform

Walsh that it was entitled to be reimbursed for pre-tender fees and costs. This failure to pay pre-tender fees and costs amounts to a breach of the insurance policy issued by Greenwich and Travelers. Accordingly, Walsh is also seeking to amend its pleadings to include express claims for breach of contract regarding the failure to pay defense fees and costs. Dkt. 90, pp. 3-4

#### DISCUSSION

Fed. R. Civ. P. 15(a)(2) provides that after a party has amended a pleading once as a matter of course or the time for amendment has expired, a party may amend only by obtaining leave of court or by consent of the adverse party. Leave to amend should be freely given when justice so requires. *Id.* The grant or denial of leave to amend is within the discretion of the trial court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). In general, if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – *i.e.*, undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by previously allowed amendments, undue prejudice to the opposing party, or futility of amendment – leave to amend should be freely given. *Id.*, 371 U.S. at 182 (per Goldberg, J.). Perhaps the most important of these factors is the prejudice that will be sustained by the opposing party. *Fosmire v. Progressive Max Ins. Co.*, C10-5291JLR, 2011 WL 4459780 at \*2 (W.D. Wash. Sept. 26, 2011) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)).

Here, there is no question of undue delay, bad faith, or dilatory motive on the part of Walsh, repeated failure to cure deficiencies by previously allowed amendments, or undue prejudice to Travelers. This is the first amendment sought by Walsh and the motion was filed prior to the current deadline to amend pleadings. Dkt. 87. Walsh also telegraphed its intent to

1 amend its pleading in the parties' Joint Status Report filed on March 22, 2024 (Dkt. 85) and  
2 provided the proposed amendments to Travelers and Greenwich shortly after the Court lifted the  
3 stay. Dkt. 91, Ackel Decl., ¶ 3. As previously noted, Greenwich has no opposition to Walsh's  
4 proposed amendments. Dkt. 96.

5 Travelers concedes pre-tender defense costs are recoverable, but argues Walsh already  
6 unsuccessfully litigated this issue. Dkt. 94, p. 2. Travelers also concedes defense costs incurred  
7 after litigation are recoverable but argues Walsh failed to properly present a claim to Travelers  
8 for these costs. Dkt. 94, p. 3.

9 Walsh's proposed amendment includes more than a breach of contract claim for the  
10 recovery of defense costs. The proposed amendment includes factual allegations describing  
11 Travelers' obligations under the Washington Consumer Protection Act and alleges Travelers  
12 breached those obligations in bad faith by "failing to inform Walsh of pertinent policy benefits  
13 and coverages." In addition to pre-tender and post filing defense costs, Walsh also claims  
14 Travelers is liable to Walsh for "attorneys' fees and costs incurred to hire an appellate firm to  
15 handle Walsh's appeal of King County's summary judgment, the amount Walsh has to pay to  
16 satisfy the judgment entered against it in favor of UGSI, and Mears."<sup>1</sup> Travelers does not address  
17 these claims in its opposition and fails to explain how these amendments are improper or how it  
18 would be prejudiced.

19 Travelers also argues any breach of contract claim related to its alleged failure to pay  
20 Walsh's pre-tender fees are frivolous and futile because this issue was already litigated. This is  
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22 <sup>1</sup> On April 8, 2022, before Travelers filed this declaratory relief action, Walsh presented a claim  
23 for reimbursement of its appellate costs to Travelers. Travelers responded it was not aware of  
any authorization to the use of Walsh's counsel for the performance of appellate work. See Dkt.  
99, Ackel Decl., Ex. A (Email Correspondence between Douglas Persoon and Travelers).

1 incorrect. On July 6, 2023, Walsh moved for summary judgment against Greenwich (Dkt. 44)  
2 and Travelers (Dkt. 48). Magistrate Judge David W. Christel recommended Walsh’s Motion  
3 against Greenwich—in which Walsh sought an order declaring that Greenwich owed Walsh a  
4 duty to defend and that Greenwich violated that duty— be granted fully. Walsh’s Motion against  
5 Travelers similarly asked for an order declaring that Travelers owed Walsh a duty to defend, but  
6 also sought a declaration that Travelers’ duty to defend included paying for defense costs  
7 incurred between the time of the filing of the underlying action and Travelers’ acceptance of the  
8 tender with a reservation of rights. Walsh “reserve[d] for future motion practice the issue of . . .  
9 the amount of any damages it sustained as a result.” Dkt. 48, p. 6.

10 Although Magistrate Judge Christel found that Travelers had a duty to defend, he found  
11 he could not rule as a matter of law that Travelers owed any defense costs because Walsh had  
12 failed to cite to the insurance policy or provide proof of when it tendered a claim for the defense  
13 costs. Dkt. 75, p. 11; Dkt. 84, p. 2 (Order Adopting)(“Walsh’s Objections fail to demonstrate that  
14 Travelers owes any pre-acceptance defense costs as a matter of law based on the available  
15 evidence.”)

16 Moreover, Travelers’ concession that it owes some defense costs does not preclude  
17 Walsh from including consumer protection and breach of contract claims for all its unpaid  
18 defense costs as Walsh’s ability to recover damages is constrained by the allegations contained in  
19 its pleadings. Because Travelers concedes Walsh is entitled to defense costs, there can be no  
20 prejudice to Travelers if Walsh now amends its pleadings to include these claims.

### 21 CONCLUSION

22 There is no showing of undue delay, prejudice, or futility. The proposed amendments do  
23 not substantially alter the theory on which this case has been proceeding nor is there any

1 indication that addition of the proposed claims will create added expense or additional discovery  
2 beyond what is already necessary, or lead to a more complicated or lengthy trial.

3 Accordingly, it is **ORDERED** that Defendant Walsh Construction Company's Motion  
4 for Leave to Amend the Third-Party Complaint against Greenwich and the Counterclaim against  
5 Travelers (Dkt. 90) is **GRANTED**. The Clerk shall post the proposed amendment (*see* Dkt. 90-  
6 2) as Walsh Const. Co. II LLC's First Amended Counterclaim and Third-Party Complaint.

7  
8 DATED this 7<sup>th</sup> day of May, 2024.

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BRIAN A. TSUCHIDA  
United States Magistrate Judge